United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7173

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

MICHAEL McSWEENEY,

Plaintiff-Appellant,

—against—

M. J. RUDOLPH CO., INC., M. J. RUDOLPH CORP., YAMASHITA SHINNIHON LINE and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Defendants-Appellees.

BRIEF ON BEHALF OF THE DEFENDANT-APPELLEE YAMASHITA SHINNIHON LINE

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Statement

The Plaintiff-Appellant, a crew member of the R-5 employed by the defendant M. J. Rudolph Company (22a), sued his employer as well as Yamashita Shinnihon Line, as owner of the YAMAWAKA MARU, and International Terminal Operating Co., Inc., the stevedore. He appeals from the judgment dated March 26, 1976 entered in the District Court for the Southern District of New York, dismissing on motion at the close of the plaintiff's evidence, the complaint as to the Defendants Yamashita Shinnihon Line and International Terminal Operating Co., Inc., and dismissing the negligence claim as to the Defendants M. J. Rudolph Co., Inc. and M. J. Rudolph Corp. and also, on the jury's verdict, rejecting his claim for unseaworthiness against the Defendants-Appellees M. J. Rudolph Co., Inc. and M. J. Rudolph Corp.

The Plaintiff-Appellant in his brief (pp. 12, 13, 21), as he did at the trial combines in shot-gun fashion nebulous allegations indiscriminately and generally against all three defendants without specifically defining how each defendant was negligent or how specifically the R-5 or the YAMAWAKA MARU was unseaworthy.

At the end of the plaintiff's case the trial court dismissed the action against Yamashita Shinnihon Line and International Terminal Operating Co., Inc. The trial court found that as a matter of law there was no unseaworthiness as to the YAMAWAKA MARU (401a). The alleged accident occurred on the Rudolph Crane R-5 50 to 75 to 100 feet (45a, 115a) at least from the YAMAWAKA MARU (150 feet is alleged in the complaint (6aa)) prior to any loading operations taking place aboard the YAMAWAKA MARU.

The plaintiff's attorney stated (400a) without any support whatsoever that the crane "R-5 automatically became an extension of the ship's hoisting gear." The court (401a) cited numerous examples where—as here, the independent contractor's gear did not become an extension of the vessel citing *Forkin* v. *Furness,* 323 F.2d 638 (2d Cir. 1963), *Sydnor* v. *Villain & Fassio,* 323 F.2d 850 (D. Maryland 1971) and *Victory Carriers* v. *Law,* 404 U.S. 202 (1971). It is interesting to note that the plaintiff's attorney requested these citations at trial (401a) but elected in his brief to ignore the judge's ruling (413a) "that the R-5 was not yet in the process of loading the vessel and therefore had, by no stretch of the imagination, become an appurtenance of that vessel" and appellant does not even refer to—much less distinguish—the *Forkin* or *Sydnor* cases in his brief.

Issue Presented

The issue presented as to Yamashita Shinnihon Line, as owner of the YAMAWAKA MARU, is whether the plaintiff adduced any evidence whatever at the trial showing any liability on the part of that defendant.

POINT I

No Unseaworthiness Was Proved Against the Defendant Yamashita Shinnihon Line as a Matter of Law.

The accident occurred on the R-5 at least 75 to 100 feet from the YAMAWAKA MARU (115a). The R-5 was owned, operated and controlled by the defendants M. J. Rudolph Co., Inc. and M. J. Rudolph Corp. and was neither owned, operated nor controlled by the defendant Yamashita Shinnihon Line. The appellant was a member of the crew of the R-5 and not of the YAMAWAKA MARU. Appellant, therefore, has no unseaworthiness claim against Yamashita Shinnihon Line since he was not a member of its ship's company, nor of that class of workmen to whom the admiralty law has extended the right to a seaworthy ship. *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

The alleged accident did not occur on the YAMAWAKA MARU and none of its gear, appurtenances or personnel were involved. The YAMAWAKA MARU was not being loaded at the time but the R-5 was preparing to load containers onto its own deck.

All changing of R-5's rigging was done by R-5 personnel (113a, 114a) and McSweeney did not (117a) even ask for any help from the crew of the YAMAWAKA MARU. Unseaworthiness—if any—(and the jury found none) could

have only been the unseaworthiness of the R-5 as the trial judge correctly stated (401a).

The qualified independent contractor M. J. Rudolph Corp. was hired to assist in loading the YAMAWAKA MARU and this of necessity required that the M. J. Rudolph's R-5 be properly rigged. The defect—if there were any—which allegedly caused McSweeney's injury was not within Yamashita's warranty of seaworthiness. Certainly, the R-5 was not an appliance appurtenant to the ship nor part of the ship's gear. There was no duty on Yamashita to inspect the R-5 or its rigging.

Forkin v. *Furness Withy & Co.*, 323 F.2d 638 (2d Cir. 1963) holds at p. 641:

> "the defect must be in a thing, or a person, within the scope of the shipowner's warranty, and a warranty normally relates to what has been furnished by the warrantor, not by someone else whose equipment is merely being readied for the warrantor's use. Alaska S.S. Co. v. Petterson, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798 (1954), affirming 205 F.2d 478 (9 Cir., 1953), and Rogers v. United States Lines, 347 U.S. 984, 74 S.Ct. 849, 98 L.Ed. 1120 (1954), reversing 205 F.2d 57 (3 Cir., 1953), are not to the contrary. In those cases the defective gear had been brought on board ship by the stevedores and used integrally with the ship's own equipment; the shipowner could have inspected the gear when it came aboard if he had chosen to do so."

POINT II

The R-5 Was Not an Extension of the YAMAWAKA MARU.

Appellant's bold assertion without any authority in his Point VII that R-5 was an extension of the YAMAWAKA MARU ignores the trial court's citations to the contrary when this was also claimed at trial (400a). *Forkin* v. *Furness Withy & Co.*, supra; *Fredericks* v. *American Export Lines, Inc.*, 227 F.2d 450 (2d Cir. 1955); *Metzger* v. *Steamship Kirsten Torm*, 245 F. Supp. 227 (D. Maryland 1965) and *Sydnor* v. *Villain & Fassio*, 323 F. Supp. 850 (D. Maryland 1971) limit shipowner's liability to some direct connection with the vessel itself. See also *Victory Carriers* v. *Law*, 404 U.S. 202, 213, 214 (1971).

Guitierrez v. *Waterman*, 373 U.S. 206 (1963) does not stand for the proposition appellant cites it for, nor was McSweeney "engaged in work formerly done by members of the ship's crew in the sailing ship days" as is stated on pages 37 and 38 of appellant's brief. *Guitierrez*, supra, dealt with unseaworthy cargo and cargo containers taken off the defendant's vessel which proximately caused an injury to a longshoreman. The plaintiff is an operating engineer (22a) on a diesel-fuel crane set on a barge 100 feet long by 38 feet wide (23a) used exclusively to lift heavy containers and vans, which is certainly a specialty not formerly engaged in by members of the ship's crew.

Yamashita's alleged liability described at the end of page 30 and the top of page 31 of appellant's brief (as quoted hereunder) proves conclusively appellant's utter lack of any authority, his assumption of facts not proven and his use of an incorrect minor premise giving the conclusion appellant desires:

"This authority of the defendant Yamashita to prepare and make up the stowage plan with its agent, the Port Captain and to make changes in said plan *demonstrates the supervisory power of the ship's officers have over the loading process.* And *it had this authority with respect to the change over of the 4 part block.* The failure of the R-5 to come prepared to Pier 6 with a 4 part block, in view of the containers and their weights which were to be lifted, *placed an obligation on the defendant Yamashita Shinnihon Line* which should have been submitted to the jury to resolve." (Emphasis added).

Even more incomprehensible is the following from pages 38 and 39 of appellant's brief:

"This operation also *would be an essential area of supervisory competence for the ship's First Mate or Chief Officer.* It would also tie in with the ship owner's reponsibility re the 50 ton container cargo and related foreseeability of inadequacy of the 'R-5' gear of 2 part block to handle the same. This would set in operation the ship's overall obligation and responsibility to Mr. McSweeney, namely the extension of the doctrine of seaworthiness. . . .

"Further, he is entitled to claim the owner chartered operator of the S.S. YAMAWAKA MARU under the extension of seaworthy benefits, i.e., unsafe place to work and the *Chief Mate's callous disregard to the Plaintiff's safety when knowingly, he took no means and measures to adequately provide proper loading gear to accommodate the excessively heavy container cargo.*" (Emphasis added).

There was no testimony at trial that the Chief Mate of the YAMAWAKA MARU had anything to do with the rig-

ging of the R-5 of the M. J. Rudolph Corp. The testimony was that plaintiff didn't even ask any of the crew of the YAMAWAKA MARU for help (115a) and in all his years working for Rudolph had never gotten any help from the crew of any cargo ship (116a, 117a).

POINT III

Not One Scintilla of Evidence Was Proved Against the Defendant Yamashita Shinnihon Line as to Negligence.

While the Complaint (12aa, 13aa) appears to allege only unseaworthiness against the defendant Yamashita Shinnihon Line the appellant's scattergun brief and trial tactics allege vaguely but fail to prove even one scintilla of evidence of negligence against the defendant Yamashita Shinnihon Line. There was no evidence that Yamashita Shinnihon Line owed plaintiff any duty. All evidence was to the contrary. Plaintiff admitted that the custom and practice when he couldn't get help from Rudolph and couldn't do the job by himself was for him to stand by and wait for help from his employer Rudolph (118a). Any negligence in this case would be plaintiff's own in not even asking his co-worker Monsinger for a tag line (111a) or in not calling his employer Rudolph for more assistance.

Appellant's reference to the Chief Mate's "callous disregard" of his safety on page 39 of his brief has no validity since it is based solely on the fact that there was a cargo plan presumably prepared by the Chief Mate. That heavy containers were to be loaded is the very reason that M. J. Rudolph was hired in the first place.

CONCLUSION

The judgment dismissing the complaint as against Yamashita Shinnihon Line should be affirmed.

Dated: New York, New York
August 10, 1976

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that two copies of the within brief was this date mailed to the following:

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